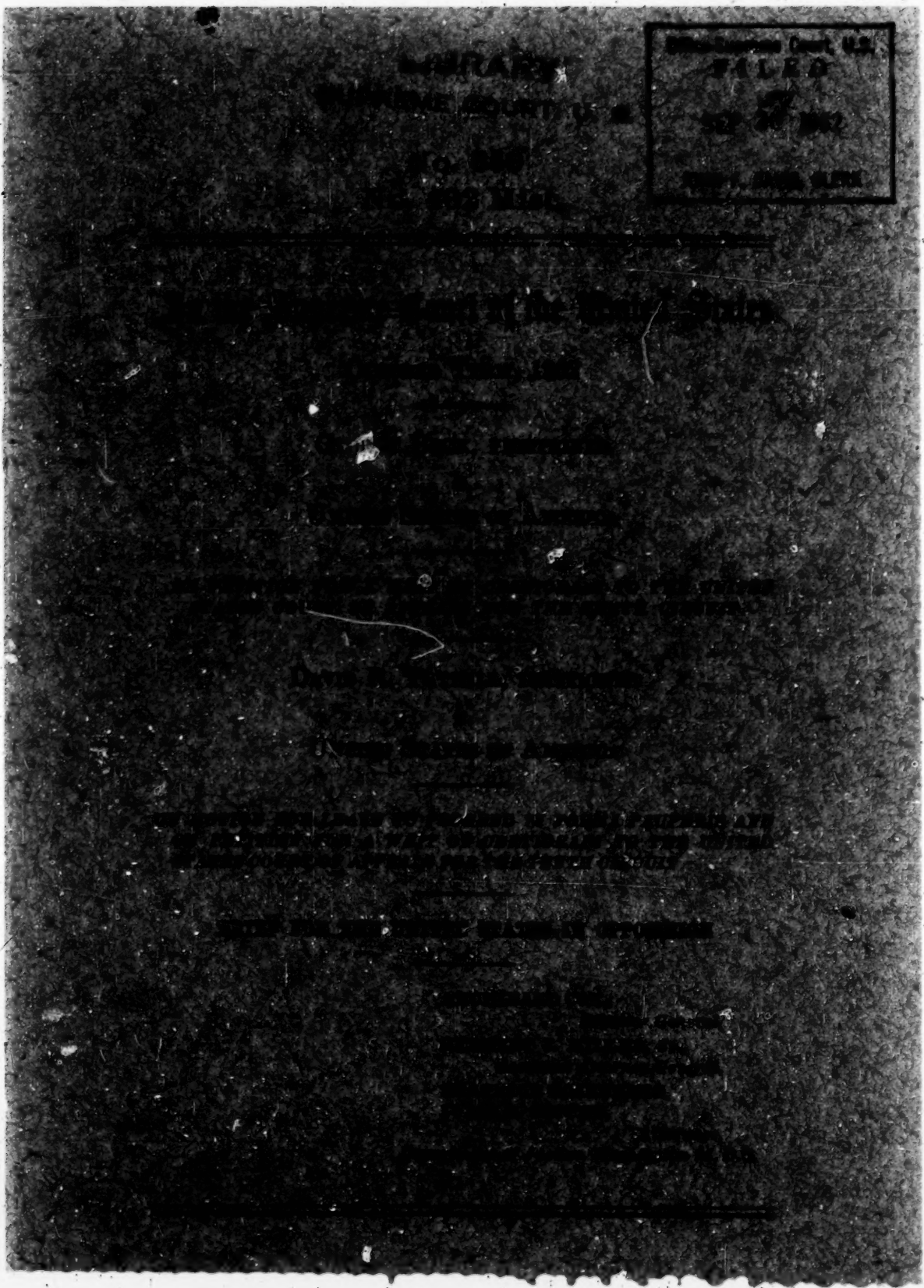

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JURISDICTION

The judgment of the court of appeals was entered on May 29, 1962. Petitions for rehearing were denied on June 21, 1962. On July 16, 1962, Mr. Justice White extended the time for filing petitions for writs of certiorari to and including August 20, 1962, and the petitions were filed on August 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court erred in refusing to give requested instructions.

STATEMENT

In an indictment returned in the United States District Court for the District of Colorado, petitioners and others were charged in twelve counts with using the mails to defraud and in one count with conspiring to use the mails to defraud. After trial by jury of petitioners and one co-defendant, petitioner Beck was convicted on the first four substantive counts and acquitted as to all other counts. Petitioner Tuthill was convicted on all twelve substantive counts and acquitted on the conspiracy count. Beck was sentenced to imprisonment for a period of eighteen months on each of counts 1, 2 and 3, the terms to run concurrently, and the imposition of sentence on count 4 was suspended. Tuthill was sentenced to imprisonment for a period of eighteen months on each of counts 1 through 11, the terms to run concurrently, and the imposition of sentence on count 12 was suspended. The court of appeals affirmed the convictions.

1. *The scheme and the evidence:*

The scheme charged in the indictment was, in essence, the sale of knitting machines under false representations designed to create the impression that the company selling the machines was guaranteeing employment. The company inserted "help-wanted" advertisements in publications, falsely representing that it was primarily a wholesaler and jobber of knitted garments with a large expanding market for such garments; that it needed employees to work at home; that the limited number of women selected for this employment could make from $10-$50 profit per week for 15 hours of work and that the profits from 4–5 hours of work per week would meet the monthly payments on the knitting machines.

The evidence showed that in 1957 Beck, who had since 1952 been the exclusive importer of knitting machines, joined Tuthill in organizing California Sportswear Corporation of Colorado. Beck became president and Tuthill secretary-treasurer. Beck, who imported the machines at a cost of $43 each, supplied them for $80 to the corporation (Tr. 1107), which in turn sold them for $350. In 1957 Beck relinquished the presidency to Tuthill but remained as vice-president and major stockholder. In January 1958, Beck took a trip to Europe, where he spent most of his time at the factory which manufactured the knitting machines, corresponding meanwhile with Tuthill about the operation of the corporation. In May 1958, he returned to this country, resigned as vice-president, and in June sold the stock. Through a privately owned company, Beck continued to supply

the corporation with the knitting machines and, as before, received a substantial profit (see Tr. 1093-1149, 1209-1211).

The testimony of the purchasers, most of them married women with small children, followed a uniform pattern. Answering help-wanted advertisements,[1] they contacted an officer or agent, who represented that the company was a leading wholesale distributor of knitwear interested not in selling machines but in employing women to make garments at home (Tr. 40–41, 100, 130, 268–269, 328, 376-378, 622, 642, 715, 742, 804, 962); that it had a backlog of orders or large contracts to supply knitwear (Tr. 129, 269, 378, 672, 820, 899); that it would supply yarn at cost; and that the knitters, by selling garments back to the company, could easily realize profits variously quoted as between 20 and 80 dollars a week (Tr. 41, 186, 236, 273, 292, 464, 486, 508, 547, 898). The husband was asked to be present at the initial interview, and both wife and husband were ultimately induced to sign a chattel mortgage securing the purchase price of a machine, a matter broached last in the conversation (Tr. 269, 486, 578, 641–642, 625, 678–679, 742, 808). A few of the witnesses testified that they did not

[1] An advertisement in the Denver Catholic Register on September 18, 1958 (Gov. Ex. 10), read as follows:

"Help wanted—Female. Housewives to work at home, we need 7 responsible ladies to earn money working in their homes, no canvassing, no selling, no telephoning. Piece work. Must have at least 15 free hours per week. ABSOLUTELY NOTHING TO BUY. Write Box 3586, Santa Fe Drive, Denver 4, Sending Phone Number.

realize they were signing a chattel mortgage on their possessions (Tr. 466, 699–700, 711, 755), were told that the mortgage was "just a formality" (Tr. 382) and first became aware of the financing when they received a book from the finance company through the mail (Tr. 382, 606). Without exception the witnesses, many of whom expended long hours and great effort in this project, testified that they realized little or no profit (Tr. 138, 177, 196, 239–242, 280, 450, 471, 611) and were unable to pay from their receipts even the monthly notes of $18.25 on the purchase price of the machines, as they had been assured would be possible. To give only one example, a witness said that she used the machine all day and half the night without stopping for lunch, but eventually had to get an outside job to pay for the machine (Tr. 322–323). The witnesses uniformly testified that it took longer to make each of the items than had been represented,[2] and that the company often did not have yarn available (Tr. 86, 108, 195, 207, 442). Some testified that the company occasionally refused to accept garments (Tr. 108, 137, 175–176, 442) and, by selecting only garments that were difficult or time-consuming or unprofitable to produce, made it impossible for the knitters to make appreciable earnings.

Several of these purchasers testified that they were interviewed by petitioner Tuthill (Tr. 127, 265–269, 328, 963). While only two testified that they were personally interviewed by petitioner Beck (Tr. 39,

[2] One of the few males purchasing the machine testified that he was a research engineer at a university, that he tested the machine and that it was physically impossible to knit an item in the time represented (Tr. 824).

192), at least eight bought their machines in 1957 at a time when Beck was president of the company and at least two had been introduced to him (Tr. 127, 155, 184, 233, 265, 327, 373, 451, 619, 667).

Six salesmen were called by the government. They testified that they followed generally the "Home Sales Pitch", a sales presentation supplied and also followed by Beck (Tr. 1148). One salesman was employed by Beck and Tuthill in 1957; the others by Tuthill in 1958 and 1959. One heard Beck giving instructions at sales meetings (See Tr. 228, 210–232, 257–262, 526–541, 658–672, 918–936, 949–959).

The evidence showed that the only outlets for the sale of the knitted garments were neighborhood variety or individual drug or grocery stores (See Tr. 1015–1016). Petitioners admitted that they did not have national accounts or a written contract for supplying such garments; they said they had used high school boys as door-to-door salesmen (Tr. 1194–1202; 1206–1207; 1427–1428). The prices at which they sold to the individual stores were less than those paid to the home knitters for the same garments (Tr. 1018–1428).

2. *The defense:*

Petitioners, by their own testimony, endeavored to show that they had acted in good faith and had attempted to find outlets for the garments and to profit from the business experience of an operation in Detroit, from which the idea of combining sales of machines and sales of garments had been taken (Tr. 1093–1224; 1226–1432).

Nine purchasers, a salesman and an attorney testified for the defense.[3]

3. *The instructions:*

In its instructions, the court, noting that the defendants had entered pleas of not guilty, told the jury that "the defendants deny the making of false representations as alleged in the indictment, and deny that they used the mails with intent to defraud, but contend in all respects that they acted honestly and in good faith" (I. 4).[4] The court then explained at length each of the counts of the indictment and the necessary elements of each offense (I. 5–22). Instructing as to the burden of the government to show false representations which were chargeable to the defendants, the court said (I. 22–23):

> * * * It is necessary that the Government prove beyond a reasonable doubt as to each defendant and as to each count that a false representation or promise was made with intent to defraud during the period of time each defendant was chargeable as being a participant in the scheme or plan or the conspiracy.
>
> One who makes false representations or

[3] Of the purchasers, who generally expressed satisfaction with the working arrangement, two had worked as salaried employees of the company, two had bought the machine for personal reasons not connected with employment and two had made previous statements directly contradictory to their testimony at trial (See Tr. 1470 et seq.) The attorney testified that while he had given advice as to the legality of the venture, the nature of his work for petitioners was primarily corporate and that he had never been shown copies of the "Home Sales Pitch" or "Home Presentation" documents (Tr. 1438–1450).

[4] "I." refers to the transcript of the court's instructions.

promises, not knowing whether they be true or false, and with reckless indifference as to whether they are true or false, may be considered by you to have been knowingly falsely made.

The burden of proof is upon the Government to prove beyond a reasonable doubt that one or more of the representations or promises set forth in the indictment were in fact false, and that they were known by the defendants to be untrue at the time they were made; or that false representations and promises were made with reckless indifference as to whether the representations or promises were true or false.

If you should determine from the evidence beyond a reasonable doubt that some one or more of the representations alleged in the indictment were made and were false, and that they were made by employees of the defendants or of companies which the defendants owned or controlled—that really, in this case, should be or of a company which the defendants owned or controlled—those false representations are chargeable to the employers if you also find from the evidence beyond a reasonable doubt that the misrepresentations were expressly or impliedly authorized by the employers, or that the employers participated in, counselled or approved what the employees were doing, or if the employers commanded, aided, or abetted or encouraged the employees to make the misrepresentations.

The court explained that the purpose of the use of the word "knowingly" in the charge was to insure that no one would be convicted for an act done because

of mistake or inadvertence or other innocent reasons (I. 24). It explained that an act was done willfully if "done voluntarily and purposely and with a specific intent to do that which the law forbids; that is to say, with evil motive or bad purpose, either to disobey or disregard the law" (I. 24). After defining the word "unlawfully" it continued (I. 25):

> You will also note that the acts charged in the indictment are alleged to have been done with intent to defraud. To act with intent to defraud means to act knowingly and with the specific intent to deceive for the purpose of either causing some financial loss to another or bringing about some financial gain to oneself.
>
> An essential element of all the offenses here charged is an intent to defraud. And this intent must be established by the evidence beyond a reasonable doubt.
>
> "Intent" as used here, means that the defendants must have had the purpose or willingness to defraud. A person is presumed to intend that which he voluntarily and wilfully does and to intend all the natural, probable and usual consequences of his act and conduct.

The court also instructed on the presumption of innocence, cautioned that the government must prove every material element of the offenses beyond a reasonable doubt, and said that, in the event of such doubt, the jury's duty would be to resolve it in favor of the defendant and to acquit him (I. 26).

At the conclusion of the instructions, petitioners excepted on the ground that the statement as to good faith was insufficient to show the theory of the defense. They also excepted to the refusal of the

court to give instructions which they proffered (I. 30, 31; see Pet. No. 350, App. C,). The requested instructions would have specifically told the jury that it must acquit if it found that the defendants acted in good faith, that consultation with the attorney could be considered on the issue of good faith and that representations not authorized or ratified by petitioners were not chargeable to them. Petitioner Beck also sought an instruction elaborating on the matter of withdrawal from the scheme or conspiracy.[5]

ARGUMENT

1. Petitioners' claim that their theory of the defense was not adequately presented to the jury is amply refuted by the summary of the instructions, *supra*. The jury was explicitly told that the defendants denied making false representations or having had intent to defraud, and that they contended they had acted honestly and in good faith. When read in the context of the charge as a whole, this instruction was adequate to present the proffered defense. The jury was told that the government must prove not only that the representations were false, but also that defendants knew them to be false or else made them with reckless indifference to their truth or falsity. The judge defined "intent to defraud" and instructed that such intent was an essential element of the offense which had to be proved beyond a reasonable doubt. The jury was also told that in the event any material element was not proved beyond a reasonable doubt, it

[5] As to the court's instruction relative to withdrawal from a conspiracy, see I. 21.

had the duty to acquit. Thus, the jury was adequately instructed that petitioners could not be convicted unless the jury found that by making knowingly false representations they acted wilfully, with intent to deceive. Taken as a whole, the charge fairly presented the issue of good faith. See *Boyd* v. *United States*, 271 U.S. 104; *Walters* v. *United States*, 256 F. 2d 840 (C.A. 9), certiorari denied, 358 U.S. 833. See also *Reistroffer* v. *United States*, 258 F. 2d 379 (C.A. 8), certiorari denied, 358 U.S. 927.

It was unnecessary to give more particularized instructions on the theory of the defense in this case because, in the circumstances here, petitioners' claim of good faith was essentially nothing more than a general denial of an intention to deceive. In contrast to the cases on which petitioners rely,[6] this case did not involve some specific limited theory on which petitioners predicated an affirmative defense, but merely a general denial of intent to defraud. True, petitioners requested an instruction that consultation with an attorney should be considered on the issue of

[6] *E.g.*, in *Bird* v. *United States*, 180 U.S. 356, the issue of self-defense in a murder case was not adequately put before the jury. *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 410, and *Pierce* v. *United States*, 314 U.S. 306, involved factual determinations, which could have placed the defendants beyond the reach of the statute. *Levine* v. *United States*, 261 F. 2d 747 (C.A.D.C.) was a false personation case where the defendant testified that he did not represent himself to be a police officer as charged but rather an "officer of the court". See *United States* v. *Pihakis*, 224 F. 2d 898 (C.A. 3), where the instructions given were confusing. In *Coleman* v. *United States*, 167 F. 2d 837 (C.A. 5), there was a much more specific factual basis for the claim of good faith and the main part of the charge was confusing.

good faith, but that request was properly refused as unsupported by the evidence, inasmuch as the attorney's testimony showed that he was not consulted on the sales representation. And requested instruction No. 10 (Pet. 350, p. 55)—that defendants' promises, although glowing and grandiose, were not fraudulent if defendants believed they would materialize—was adequately covered in the judge's charge that in order to convict, the jury had to find that the representations were not only false, but known by the defendants to be false. In short, the so-called affirmative defense in this case was merely a negation of the government charges and did not require separate charges beyond those given.

2. Petitioner Beck also complains that the trial court improperly refused to instruct the jury to disregard all evidence which had not been connected to him by evidence of authorization or ratification, and that the court also improperly refused to instruct as to withdrawal from the scheme. The court instructed that the false representations were chargeable to the employers if the jury could find from the evidence beyond a reasonable doubt that the misrepresentations were expressly or implicitly authorized by the employers, or that the employers participated in, counselled or approved what the employees were doing, or if the employers recommended, aided or abetted or encouraged the employees to make the misrepresentations. It instructed that the government must prove that the false representation or promise was made with intent to defraud during the period of time for which each defendant was chargeable with participa-

tion in the scheme or plan or conspiracy. The jury acquitted the petitioner Beck on all counts except those with respect to which the evidence clearly showed him to be an officer, stockholder and participant working in the interest of the corporation. Petitioner's conviction on any one of the first three counts (the first two of which charge offenses committed in September or October 1957 when he was admittedly the salaried president) will support his eighteen-month prison sentence.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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